U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27186230

Date: NOV. 17, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, a meat processor, sought to permanently employ the Beneficiary as a meat boner. The company requested his classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring less than two years of training or experience. *Id.*

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval and dismissed the Beneficiary's following motion to reconsider.[1] The Director concluded that the company did not demonstrate its required ability to pay the offered job's proffered wage and submitted "falsified financial documentation." On appeal, the Beneficiary contends that the Director: unfairly "held him responsible" for the Petitioner's actions; unreasonably delayed the petition's revocation; and violated his Due Process rights under the U.S. Constitution.

As the appellant in these revocation proceedings, the Beneficiary bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that we lack authority to consider his constitutional claim and that his other arguments lack merit. We will therefore dismiss the appeal.

I. LAW

Immigration as an "other" - or unskilled - worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent

[1] As a petition beneficiary, the Beneficiary is not an "affected party." *See* 8 C.F.R. § 103.3(a)(1)(ii)(B). Thus, he could not file appeals and motions in the initial visa petition proceedings. But, in these revocation proceedings, U.S. Citizenship and Immigration Services (USCIS) treats him as an affected party because he qualified to "port" to a new employer under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly notified USCIS of his eligibility to port. *See Matter of V-S-G-Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

Finally, if USCIS approves a petition, a beneficiary may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

"[A]t any time" before a beneficiary obtains permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition if the unrebutted and unexplained record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner does not timely respond to an NOIR or the business's response does not overcome the alleged revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

As discussed more fully below, the NOIR in this matter questioned the validity of the Petitioner's ability-to-pay evidence. The notice stated that, in 2013, the Petitioner's president told a USCIS officer that he has refused to submit copies of the business's federal income tax returns with any of its immigrant visa petitions, calling into question the company's purported 2001 tax return in this matter.

II. FACTS

The Petitioner filed the labor certification application accompanying this petition in March 1994. As listed on the labor certification, the company initially offered its job to a different noncitizen than the Beneficiary. Until July 16, 2007, employers could substitute qualified noncitizens into unused labor certifications. 20 C.F.R. § 656.11(a). When the Petitioner filed this petition in June 2002, it substituted the Beneficiary into the labor certification, and USCIS approved the petition in October 2003. At that time the Beneficiary's application for adjustment of status, which he had filed in February 2003, remained pending.

In April 2021, the Beneficiary's adjustment application was still pending when he requested permission from USCIS to port to a new employer. Under the portability provision, a petition for a noncitizen whose adjustment application has remained unadjudicated for at least 180 days "shall remain valid" if they change jobs or employers and the new job is in the same or similar occupational classification as the one listed on the petition. Section 204(j) of the Act. USCIS granted the Beneficiary's portability request about 10 days after receiving it.

In July 2021, USCIS issued the NOIR to the Petitioner. Because the Beneficiary qualified to port and properly requested to do so, USCIS sent him a copy of the NOIR and allowed him to participate in the revocation proceedings. *See Matter of V-S-G-*, Adopted Decision 2017-06 at 10.

The NOIR alleged that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay a proffered wage from a petition's priority date onward). The labor certification states the proffered wage of the offered position of meat boner as $5.50 an hour, or, based on a 40-hour work week, $11,440 a year.

The petition's priority date is March 16, 1994, the date an office in DOL's employment service system accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(g)(2) (explaining how to determine a petition's priority date). Thus, the Petitioner had to demonstrate its ability to pay the proffered wage from the petition's priority date of March 16, 1994 until June 26, 2002, the petition's filing date.

Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal income tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). If a petitioner employs at least 100 workers, however, USCIS may instead accept a letter from a financial officer as proof of a business's ability to pay. *Id.* The NOIR notes that, as evidence of the Petitioner's ability to pay, the company submitted only a 1995 letter from its president, which stated its employment of 260 people, and the copy of its purported federal income tax return for 2001. The record lacks evidence that the Petitioner ever employed the Beneficiary.[2]

As noted above, the NOIR questioned the validity of the Petitioner's ability-to-pay evidence. The NOIR stated that, during a USCIS officer's 2013 visit to the company, the Petitioner's president told the officer that he has refused to submit copies of the business's federal income tax returns with any of its immigrant visa petitions. Further, he declined to provide the officer with the Petitioner's tax returns, raising doubts about the validity of the company's purported 2001 tax return. Also, while the 1995 letter indicates the Petitioner's employment of 260 people, the company's president reportedly told the USCIS officer that the business usually had only about 25 employees. Based on the president's statements to the officer, the NOIR alleged the company's willful misrepresentation of its number of employees in the 1995 letter and submission of a false 2001 tax return.

Shortly after USCIS mailed the NOIRs, the U.S. Postal Service returned the Petitioner's notice to USCIS as "undeliverable." The Beneficiary, however, timely responded to his notice. In a letter, he asked USCIS to reconsider the petition's revocation, stating that he and his spouse had been waiting almost 20 years to become permanent residents, and that, during that time, two of their three children were born in this country. He did not, however, contest the revocation's basis or provide evidence that the Petitioner had ever employed or paid him.

The Beneficiary's NOIR response also included a letter from the Petitioner's president. He stated:

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[2] The Beneficiary need not work for the Petitioner until after he obtains permanent residence. *See Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("An alien is not required to have been employed by the certified employer prior to adjustment of status.")

> Although the broker who worked on behalf of our company for immigration related matters provided incorrect information on immigration papers, it was true that we had been looking for workers who were willing to work at our plant. It had been very difficult to hire meat cutters and other workers for our plant.

The Petitioner's president stated that the company is "unable to supply tax return copies for the applicable time period." But he said: "I can confirm that we made sufficient profits to cover [the Beneficiary's] proposed yearly salary of $11,440."

In May 2022, the Director found the Beneficiary's NOIR response to be insufficient and revoked the petition's approval. The Beneficiary filed a motion to reconsider, again asking USCIS to rethink the revocation. He stated that "our family did not know [that there was] incorrect information on the immigration documents." The Beneficiary also suggested that, after the USCIS officer visited the Petitioner's plant in 2013, USCIS unreasonably delayed initiation of the revocation proceedings until 2021. He stated: "It is very difficult to understand why USCIS took more than 8 years to send the aforesaid NOIR."

Finding that the filing did not demonstrate USCIS' misapplication of law or policy, the Director, in February 2023, dismissed the Beneficiary's motion. *See* 8 C.F.R. § 103.5(a)(3) (requiring a motion to reconsider to demonstrate a prior decision's misapplication of law or policy based on the record at the time of the decision).

III. ANALYSIS

A. "Unreasonable Delay"

On appeal, the Beneficiary contends that USCIS had "a general duty" to make a revocation decision on the petition "in a reasonable and timely manner." He states that he "lost a significant opportunity to dispute the claim, as the [revocation] decision was made after he had transferred his employment to another company." He argues that, because he no longer intended to work for the Petitioner, "he could not expect full support from the original employer" in responding to the NOIR.

The Act's plain language, however, places no time constraints on a petition's revocation. Acting for the Secretary of Homeland Security, USCIS may revoke a petition's approval "at any time." Section 205 of the Act. "Congress therefore placed no limitation on the Secretary's ability to revoke a previously approved petition." *Cabrera Cabrera v. USCIS*, 374 F. Supp. 3d 153, 162 (D.D.C. 2019). Also, we again note that the Beneficiary does not contest the revocation grounds based on USCIS' finding of insufficient evidence of the Petitioner's ability to pay, nor does he submit evidence that the company has employed him.

To support his unreasonable-delay argument, the Beneficiary refers to purported cases from the U.S. Courts of Appeals for the Ninth and Federal Circuits. But he miscites the cases, and we are unable to find applicable cases based on either the case names or the legal citations he uses. The Beneficiary therefore has not demonstrated USCIS' purported duty to revoke the petition in a timely manner.

Further, we acknowledge that the petition's revocation will not allow the Beneficiary and his family opportunities to apply for permanent residence based on this Form I-140, Immigrant Petition for Alien Worker. But USCIS provided him with an opportunity to participate in the revocation proceedings, and he has not challenged the Director's conclusion that USCIS erroneously approved the petition. *See Herrera v. USCIS*, 571 F.3d 881, 886-89 (9th Cir. 2009) (holding that the portability provision does not affect USCIS' revocation authority and noting that "in order for a petition to remain 'valid [under the provision],' it must have been valid from the start"). The Beneficiary claims that the revocation's timing - after he ported to his new employer - deprived him of the Petitioner's help in challenging the revocation. But his NOIR response included a letter from the company's president. The record therefore does not establish that he "lost a significant opportunity to dispute" the petition's revocation.

B. Responsibility for the Petitioner's Actions

Although not included in his motion to reconsider, the Beneficiary's additional arguments on appeal are also unavailing. Citing federal court decisions, he contends that he "cannot be held responsible for the employer's violation of the immigration laws." He argues that he lacked control over the content of the Form I-140 for him and its supporting evidence.

Contrary to the Beneficiary's argument, however, USCIS has not held him responsible for insufficient evidence of the Petitioner's ability to pay, the alleged misrepresentation in the company's letter, or the company's purported false tax return. Neither the NOIR nor the revocation decision accuse the Beneficiary of misrepresentation or find him inadmissible to the United States on that basis. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

Also, the federal decisions the Beneficiary cites to support his argument involve the Fair Labor Standards Act (FLSA), which establishes standards regarding minimum wages, overtime pay, recordkeeping, and youth employment. *See Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988); *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).[3] The cases' facts therefore distinguish them from this matter. In *Patel*, the U.S. Court of Appeals for the Eleventh Circuit held that an undocumented noncitizen qualified as an "employee" within the meaning of the FLSA and therefore could legally seek unpaid wages and liquated damages under the act from his former employer. *Patel*, 846 F.2d at 706. In *Flores*, a U.S. district court held that discovery regarding an employee's immigration status was not relevant to her FLSA claim and that "the potential for prejudice far outweighs whatever minimal probative value such information would have." *Flores*, 233 F. Supp. 2d at 464-65 (citation omitted). Because the Beneficiary's case does not involve the FLSA, the cited cases do not support his argument.

C. Abuse of Discretion

The Beneficiary also contends that, in revoking the petition's approval, USCIS abused its discretion by "ignoring" his prior porting to his new employer. He states that "USCIS should have known that

[3] The offered job's proffered wage of $5.50 an hour does not meet the worksite's current minimum wage rate of $7.25 an hour. *See* Pa. Dep't of Labor & Indus., "General Wage and Hour Questions," www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Pages/Wage-FAQs.aspx#:~:text=1.,Pennsylvania%20is%20%247.25%20per%20hour. Thus, ironically, the Petitioner's labor certification no longer meets FLSA requirements.

[he] would be in a vulnerable situation, as he would not be able to receive any support from his original employer after leaving their employment."

But, as previously discussed, the Act authorizes USCIS to revoke a petition's approval "at any time." Section 205 of the Act. Also, when contemplating revocation, USCIS need not consider a beneficiary's circumstances. Rather, the Agency examines whether evidence at the time of a NOIR's issuance would have warranted a filing's denial. *Matter of Estime*, 19 I&N Dec. at 451. Further, as previously discussed, the Beneficiary had an opportunity to challenge the petition's revocation, and the Petitioner's president assisted him in responding by providing a letter. The record therefore does not demonstrate that USCIS abused its discretion in revoking the petition's approval, or that the revocation's timing deprived the Beneficiary of the Petitioner's participation.

D. The Beneficiary's New Employer

The Beneficiary further contends that USCIS should have issued a NOIR copy to his new employer rather than to the Petitioner. He argues that, once he ported to his current employer, the Petitioner lacked incentive to challenge the petition's revocation.

We addressed this issue, however, in *V-S-G-*, a decision that USCIS adopted as binding on all Agency employees. We held that original petitioners remain affected parties even after their beneficiaries port to new employers. *Matter of V-S-G-*, Adopted Decision 2017-06 at 12. We noted that: DHS regulations require petitioners' receipt of NOIRs and opportunities to respond to them; petitioners' may wish to defend themselves against NOIR allegations of fraud or immigration noncompliance; beneficiaries' immigration outcomes may affect petitioners' efforts to recruit and train other employees; petitioners may seek to support their former beneficiaries to encourage them to return to employment with the petitioners; and petitioners filed the petitions, paid their filing fees, and attested to their accuracy. *Id.* In contrast, we ruled that employers to whom beneficiaries have ported do not merit participation in revocation proceedings. *Id.* at 12-13. We noted that new employers: did not pay for the petitions' filings; are not responsible for maintaining the petitions; are not liable for the petitioners' noncompliance or malfeasance; cannot withdraw the petitions; cannot prevent beneficiaries from porting to other employers; and are not well-positioned to answer NOIR questions about the petitions or to provide additional evidence. *Id.* Unpersuaded by the Beneficiary's argument, we decline to alter our holding in *V-S-G-*. Additionally, the NOIR requested evidence of the initial Petitioner's ability to pay, materials that a later employer could not likely provide.

E. Due Process

Finally, the Beneficiary argues that the petition's revocation violated his constitutional Due Process rights. Under the Fifth Amendment, "[n]o person shall be . . . deprived of life, liberty, or property without due process of law."

We cannot rule on the constitutionality of federal regulations or laws. *See, e.g., Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992) (holding that an Immigration Judge and the Board of Immigration Appeals (BIA) lacked jurisdiction to rule upon the constitutionality of the Act and its implementing regulations); *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 339 (BIA 1991) ("It is well settled that it is not within the province of this Board to pass on the validity of the statutes and regulations we

administer.") (citations omitted). Thus, we decline to consider this argument. We note, however, that the Beneficiary's constitutional claim might be invalid. In a nonpublished decision, the U.S. Court of Appeals for the Fourth Circuit, which has jurisdiction over the Beneficiary's residence, ruled that a noncitizen could not allege a colorable Due Process claim because he could not establish a protected life, liberty, or property interest in the immigrant visa petition for him that USCIS revoked. *See Diomande v. Gonzales*, 247 Fed. Appx. 450, 451 (4th Cir. 2007).

III. CONCLUSION

For the foregoing reasons, the Beneficiary has not demonstrated the Director's misapplication of law or policy in dismissing his motion to reconsider. We will therefore affirm the motion's dismissal.

ORDER: The appeal is dismissed.